CF0000062218

(2)

BEFORE THE HON'BLE HIGH COURT OF JUDICATURE AT:JABALPUR

Criminal Appeal No. 2487 of 1999.

CRIMINAL APPEAL U/S 374 OF THE CODE OF CRIMINAL PROCEDURE:

(12258)

Filed on 23/9/99
by Shri D. Tiwari Advocate

APPELLANT : Ram Kumar @ Kumar Kewat [ENTAIL]
S/o Punaou Kewat,
Aged about-35 years,
Occupation-Labour R/oVillage-Tendo
P.S.-Khamaria Distt.Durg (M.P.)

VERSUS

RESPONDENT: State of Madhya Pradesh

Rs. A.R.

CLERK
Advocate General
JABALPUR

NIHCPS

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DB:- Hon'ble Shri L.C. Bhadoo, Ag. C.J. &
Hon'ble Shri Sunil Kumar Sinha, J.

9-2-2007:-

Smt. Savita Tiwari, counsel for the appellants.

Shri Akhil Mishra, Panel Lawyer for the State/respondent.

Oral judgment dictated on *Dais*.

L.C. Bhadoo, Ag. C.J.

Criminal appeal No.1263/98 filed by Sitaram and criminal appeal No.2487/99 filed by Ram kumar are arising out of the same incident and same judgment delivered by Additional Sessions Judge, Bemetara, in S.T. No.249/95, therefore, they are being disposed of by this common judgment.

Accused Sitaram was granted bail by this Court vide order dated 24/2/2003 and accused Ram Kumar was granted bail by this Court vide order dated 6/3/2000, but they are not able to furnish bail bonds, they are still in custody. They are in detention since 1995, therefore, appeals are heard for final disposal.

By these appeals, accused/appellants have questioned legality and correctness of the judgment dated 6-5-98 passed by the Additional Sessions Judge, Bemetara in S.T. No.249/95 whereby learned Additional Sessions Judge after holding the accused/appellants guilty for commission of offence under Section 302 read with Section 34 of the IPC for commission of murder of Arvind sentenced each of the accused to undergo imprisonment for life and to pay a fine of Rs. 200/-, in default of payment of fine to further undergo RI for one month. They have further

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

been convicted under section 302/34 of the IPC for committing murder of Virendra @ Raja and sentenced to undergo imprisonment for life and to pay fine of Rs. 200/-, each in default of payment of fine to further undergo RI for one month. Sentences for both the offences were ordered to run one after the other. In addition to that, accused Sitaram has also been convicted under section 323 of the IPC and sentenced to undergo RI for six months. Sentence imposed under this section was ordered to run concurrently with life imprisonment.

Case of the prosecution in brief is that on in the wee hours of 17.3.1995 at 3.20 a.m. Ashok Das Kotwar of village Tendro gave *merg* intimations Ex. P-44 and P-45 in the police station Khamaria to the effect that Sitaram and Kumar Kewat have committed murders of Arvind and Virendra @ Raja. Body of Arvind is lying in the street in front of the house of Bhagas and body of Virendra alias Raja is lying in the street in front of the house of Jagdish. Based on above merg intimations FIR Ex. P-46 was registered after 10 minutes of the merg intimations. Investigating Officer left for the scene of occurrence, after giving notice Ex. P-47 & P-48 to the Panchas prepared inquest report Ex. P-1 on the body of Arvind & Ex. P-2 on the body of Virendra alias Raja. During the custody accused Sitaram gave memorandum Ex. P-17 about weapons of offence i.e. lathi, in pursuance of that bamboo stick (lathi) was taken into possession under Ex. P-18. Accused Ram Kumar gave memorandum Ex. P-19, in pursuance of that one iron rod was recovered under Ex. P-20. Site plan Ex P-23 of the place of occurrence was prepared. Dehati Nalisi Ex. P-24 was recorded by S.K.A. Nakvi TI Bemetra on 23.3.1995. The dead body of Arvind was sent for post mortem examination under Ex. P-49 to the Government Hospital, Bemetra where Dr. N.K. Tiwari conducted post

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

mortem, prepared post mortem report Ex. P-16 wherein he opined that the death was due to shock and haemorrhage. The body of Virendra alias Raja was sent for post mortem examination under Ex. P-50 to the Government Hospital Bemetra. Dr. N.K. Tiwari conducted post mortem on his body, prepared post mortem report Ex. P-3 wherein he opined that cause of death was shock and haemorrhage. Plain soil, blood stained soil and one HMT make wrist watch of Arvind were taken into possession from the place where body of Arvind was found under Ex. P-51. *Chappls,* one shirt stained with blood, blood stained soil were taken into possession from the place of occurrence in front of the house of Jagdish under Ex. P-52. Damaged drums (nagada) were taken into possession under Ex. P-53. One full shirt and full pant of Sitaram on which blood like stains were there, were taken into possession under Ex. P-55. One shirt and full pant of accused Ram Kumar on which blood like stains were there were taken into possession under Ex. P-56. Baniyan of deceased Virendra alias Raja was taken into possession under Ex. P-57. Other clothes of deceased Virendra were taken into possession under Ex. P-58.

Based on Dehati Nalisi Ex. P-24 and investigation, a detailed FIR Ex. P-59 was registered. Recovered articles were sent for chemical examination to the Forensic Science Laboratory, Raipur, from where report Ex. P-60 was received Serologist's report Ex.P-61 was received from Assistant Serologist and Chemical Examiner to the Government of India, Kolkata.

After completion of investigation charge sheet was filed against accused Sitaram, Ramkumar and Ashok Das in the Court of Additional Chief Judicial Magistrate, Bemetra, who in turn committed the case to the

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश - 4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Sessions Judge, Durg, from where learned Additional Sessions Judge received the case on transfer.

Prosecution in order to establish the charge against the accused persons examined 22 witnesses. Statements of the accused persons were recorded under section 313 of the Code of Criminal Procedure in which they denied the material appearing against them in the prosecution evidence, stated that they are innocent and have been falsely implicated in the crime.

Learned Additional Sessions Judge after hearing counsel for the respective parties convicted and sentenced accused Sitaram and Ramkumar as aforementioned, whereas acquitted Ashok Das of all the charges.

We have heard learned counsel for the parties.

Learned counsel for the accused/appellants has not disputed homicidal death of deceased Arvind and Virendra alias Raja. Moreover, Dr. N.K. Tiwari PW-8, who conducted post mortem on the body of Arvind and Virendra, has stated that on 17.3.1995 he was working as Assistant Surgeon in the Government Hospital, Bemetera. On the said date, he conducted post mortem on the body of Virendra and noticed following injuries:

(i) lacerated wound in the size of 3" x ½" x bone deep over left parietal region, on opening of head it was found that parietal bone was fractured in the length of 5",

(ii) lacerated wound in the size of 1" x 1/3" x bone deep left side of forehead;

(iii) lacerated wound on the right ear in the length of 1½ ";

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

(iv) lacerated wound in the size of 2" x 3" x 4" deep on right parietal region, parietal bone was fractured into pieces and damaged the brain;

(v) there was swelling on right mandibular region in the size of 3" x 3".

On account of these injuries there was bleeding and clotted blood was also present. On examination it was found that internal organ became pale. All the injuries were ante mortem in nature and the same were caused by hard and blunt object. Cause of death was excessive haemorrhage and shock. He has further stated that on 17.3.1995 he conducted post mortem on the body of Arvind and following injuries were noticed by him:

(i) lacerated wound in the size of 1" x 1/3" x bone deep on the right side of forehead;

(ii) lacerated wound on the left ear in the length of 1½";

(iii) there was abrasion in the size of 3" x 2" on the left shoulder;

(iv) four abrasions on right leg in the size of 1/3" x 1/3" x ½" x ½";

(v) there was lacerated wound in the length of 4", 3" in width and 3" deep, injury was on the left occipital and parietal region, broken pieces of bone pierced into brain. On examination of internal organ it was found that they became pale;

He has further stated that these injuries were ante mortem in nature caused by hard and blunt object. Cause of death was excessive bleeding and shock. In view of the above medical evidence and the evidence of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

PW-4 Santosh, it is established that death of Arvind and Virendra was homicidal in nature.

As far as involvement of accused persons in committing murders of Arvind and Virendra alias Raja is concerned, in this case, there are three eyewitnesses produced by the prosecution namely PW-4 Santosh, injured eyewitness, PW-7 Rambagas and PW-11 Hematdhar Diwan. The prosecution has also examined PW-12 Shivkumar, PW-13 Bharat Sahu and PW-17 Kanahiyaram as eyewitnesses. But these three eyewitnesses have turned hostile and even in their cross examination the prosecution has not been able to elicit any circumstance connecting the accused with the crime in question. PW-4 Santosh has stated that in the fateful night he was going to watch Holi along with Arvind, on the way when they reached near the house of Ashok Kotwar, Kanahiya and Bharat met them. Ashok Kotwar disclosed that Sitaram and Ramkumar have damaged drums (nagada). When they proceeded further drum owners met them. On inquiry by Arvind, these persons disclosed that Sitaram and Ramkumar have damaged their drums, therefore, they went in front of the house of accused Sitaram. Arvind called Sitaram from out side of the house on which Sitaram inquired as to who is calling, on which Arvind replied that 'I am Arvind'. Sitaram came out of his house carrying club in his hand and attacked Arvind with that club on his head. He did not see Ramkumar. On account of assault made by Sitaram Arvind started running. He was standing behind Arvind. Accused also assaulted him with the same club on his head as a result of which he fell down and his eyes were closed. When he woke up, no one was present there. After reaching the house, he informed his father Shiv Kumar. His father inquired about Raja Dau on which he replied that he might be at his house. Thereafter, he along with

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

those persons went to the house of Raja Dau alias Virendra, he informed womenfolk that Sitaram has attacked him and Arvind with lathi. He went to the house of Virendra but he was not at his residence. PW-7 Rambagas has stated that he was at the place where drums were damaged by Sitaram and Ramkumar. He informed the village Kotwar that drums have been damaged by Sitaram and Ramkumar. He went towards the house of Dau, from that side Arvind and Santosh were coming. Arvind inquired from Ashok Das Kotwar as to what has happened then Ashok replied that Sitaram and Ramkumar have damaged drums on which Arvind said that let us go to the house of Sitaram, he was also with them. Owners of drum were also following them. Arvind called Sitaram, Sitaram while coming from inside asked who are you, Arvind replied " I am Arvind". Thereafter, Sitaram came out of his house carrying lathi in his hand and attacked with the said lathi on his head. Thereafter, he also assaulted Santosh with the same lathi and then they ran away. Ram Kumar also rushed towards them carrying rod but they ran away and went to their respective houses. PW-11 Hematdhar Diwan has also stated that on 16.3.1995 he went to Tendro, Arvind asked him that he is going to watch Holi on which he replied that he would not go on which Santosh accompanied Arvind and Arvind was having a dagger with him. 10-15 minutes thereafter call bell rang, on inquiry that person disclosed himself to be Ashok Kotwar and said that Sitarm and Ram Kumar are assaulting Arvind on which he said that let us go and see who is beating. Kotwar asked him to stay there and call Raja Dau on which he called Raja Dau. Raja Dau came out and left the house along with Ashok. He also followed them. Dau started talking in front of the house of Sitaram. Sitaram and Ram Kumar came out of their house having club and rod in their hands and started attacking Dau. He

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -8-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

asked them 'who are you', on which Sitaram rushed towards them, when he attacked him, he was able to protect him, but he fell down and he ran away towards the house. Ashok Kotwar met him on the way, when he fell down, Sitaram attacked him with lathi twice or thrice. He sustained injuries near waist. The evidence of PW-11 Hematdhar Diwan has been disbelieved by the trial Court in para-19 of the judgment.

We have perused police diary statement (Ex.-D/5) of this witness recorded under Section 161 Cr.P.C.. Perusal of this statement shows that this witness has not stated that he witnessed the accused persons attacking Virendra @ Raja. He has made improvement in his evidence before the Court. He has been rightly disbelieved by the trial Court. Therefore, evidence of PW-4 Santosh and PW-7 Rambagas remains to be scrutinized. Evidence of PW-4 Santosh and PW-7 Rambagas, as mentioned earlier, shows that Sitaram attacked Arvind with Lathi on his head, as a result of which he sustained injuries. In cross-examination of these two witnesses, defence has not been able to elicit any circumstance to discredit their evidence in respect of the fact of involvement of accused Sitaram in attacking deceased Arvind. The medical evidence of Dr. N.K. Tiwari (PW-8) has corroborated the evidence of these eyewitnesses. He has stated that injuries inflicted on the head of Arvind were caused by hard and blunt object. It was noticed by the doctor that Injury No.5 was lacerated wound in the size of 4" x 3" and 3" deep on occipital and parietal region, broken pieces of the bone of head pierced into brain and other injuries were simple in nature like abrasions. Even though there was lacerated wound on the right side of forehead, that was only deep upto the bone, bone was not fractured. Other lacerated wound was on left ear, as such only injury No.5 was fatal on account of which there was excessive

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश – 9–	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

bleeding and shock and the deceased died. PW-4 Santosh and PW-5 Samaruram have categorically stated that accused assaulted with lathi on the head of Arvind. Therefore, it is established that fatal injury was caused by Sitaram on the head of deceased Arvind and on account of that he died. The manner in which, the force with which accused Sitaram attacked deceased Arvind with lathi on his head that is on vital part as a result of which bone turned to pieces and pierced into the brain, intention of the accused Sitaram to cause death of Arvind is writ large. Moreover, evidence of these witnesses shows that Arvind simply called Sitaram and Sitaram inquired from inside as to who are you then Arvind replied that 'I am Arvind'. After identifying him from inside he came out with lathi and without having any talk with Arvind without any rhyme or reason accused Sitaram attacked deceased Arvind who sustained fatal injury on the head and skull bone was fractured and pierced into brain. Therefore, we are of the considered opinion that accused Sitaram has rightly been convicted for the commission of murder of Arvind and to this extent we do not find any illegality or infirmity in the judgment of the trial Court.

As far as involvement of the accused/appellant Ramkumar and Sitaram in committing murder of Virendra alias Raja is concerned, these two witnesses have not stated in any manner that Sitaram attacked deceased Virendra alias Raja or accused Ramkumar attacked Virendra alias Raja. Evidence of PW-11 Hematdhar Diwan, as mentioned above, does not inspire confidence of the court and has rightly been rejected by the trial Court that he was not eyewitness to the incident.

Now only circumstantial evidence that remains against this accused is iron rod recovered at the instance of this accused which was found to

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — /0 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

be stained with blood, in this connection chemical examainer's report Ex. P-60 is there which has been marked as "I". In Ex. P-60 it has been mentioned that the said iron rod was stained with blood. As per the serologist's report iron rod was stained with human blood but there is no report that blood was of which group because blood was not sufficient for the test. Moreover, there is no report that human blood which was found on the rod was of the blood group of the deceased. Therefore, merely on the ground that rod was recovered at the instance of this accused and human blood was found on that, accused Ramkumar cannot be connected with the murders of Virendra and Arvind. Full shirt and full pant of accused Ramkumar articles K-1 and K-2 were sent for chemical examination and as per the chemical examiner's report same were found stained with blood. As per the serologist's report full shirt K-1 and full pant K-2 were marked as item No. 53 and 54. Human blood was found on full shirt of accused Ramkumar but origin of blood on the full pant could not be ascertained on account of the fact that same was disintegrated. But even if we presume that human blood was found on the shirt of the accused, there is no report that what was group of the blood which was found on the shirt of the accused. Further, there is no report that blood found on the shirt of the accused was of the blood group of the deceased, therefore, based on above, accused cannot be connected with the murders of Arvind of Virendra alias Raja.

As far as conviction of accused Sitaram for committing murder of Virendra is concerned, there is no evidence on record that accused Sitaram in any manner attacked Virendra. As far as circumstantial evidence is concerned, as per the serologist's report there was human blood on lathi marked at 'H' which was recovered at the instance of the

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -//-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

accused Sitaram. But there is no report that,that blood was of the group of deceased and again whether that blood was of the group of the blood of deceased Virendra alias Raja. On full shirt and full pant articles 'J-1 and J-2' belonging to Sitaram human blood was found but origin of the blood could not be ascertained on account of the fact that blood was disintegrated. Blood on pant of Sitaram was human blood as per serologist's report Ex. P-61 but there is no report that what was the blood group of the same and also there is no report that the blood was of the blood group of deceased Virendra alias Raja.

Therefore, there is no ocular or circumstantial evidence in connection with murder of Virendra alias Raja against accused Sitaram and Ramkumar. Similarly, there is no direct or circumstantial evidence against accused Ramkumar to connect him with the murder of Arvind.

In the result,

(i) Criminal Appeal No. 2487/1999 filed by accused Ramkumar is allowed. Conviction and sentence imposed on him under section 302/34 of the IPC for committing murders of Arvind and Virendra alias Raja are set aside. He is acquitted of the said charges He be set at liberty forthwith, if he is not required in any other case.

(ii) Criminal Appeal No. 1263/1998 filed by accused Sitaram is partly allowed. His conviction under section 302/34 of the IPC for committing murder of Virendra alias Raja is set aside and he is acquitted of the said charge. However, his conviction under section 302/34 of the IPC for committing

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -12-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

murder of Arvind is maintained and to that extent, appeal is liable to be dismissed. His conviction under section 323 of the IPC is also maintained and to that extent also the appeal is liable to be dismissed. Accordingly, it is dismissed.

Sd/-
L.C. BHADOO
Judge

Sd/-
SUNIL KUMAR SINHA
Judge

Barve

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